

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Investigation by the Department on its own motion into the appropriate regulatory plan to succeed price cap regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' retail intrastate telecommunications services in the Commonwealth of Massachusetts

DTE 01-31

**MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC.
TO STRIKE PARTS OF THE "REBUTTAL" TESTIMONY OF ROBERT
MUDGE AND MICHAEL J. DOANE, OR, IN THE ALTERNATIVE,
FOR LEAVE TO FILE SURREBUTTAL AFTER DISCOVERY,
IF WARRANTED**

AT&T Communications of New England, Inc. ("AT&T") requests that portions of the "rebuttal" testimony of Robert Mudge and Michael J. Doane submitted by Verizon Massachusetts ("Verizon") on September 21, 2001, be stricken from the record. In this "rebuttal," Verizon improperly attempts to present an entirely new direct case, rather than rebutting the arguments set forth by AT&T and the other parties in the proceeding.

Specifically, Verizon has submitted individual wire center data in an effort to demonstrate that sufficient competition exists to justify deregulation. Rebuttal testimony, however, does not provide an opportunity to present new data and analyses that could have been and should have been submitted on the case-in-chief. The purpose of rebuttal testimony is to critique or seek to disprove or rebut the opposing case. To the extent Verizon's rebuttal testimony attempts to present new evidence that purports to support its

primary contention, rather than evidence supporting a critique of AT&T's position, the rebuttal testimony of Mr. Mudge and Mr. Doane should be stricken.

If the Department denies AT&T's motion to strike, then AT&T in the alternative moves to amend the procedural schedule to permit AT&T sufficient time to conduct discovery on the new data that Verizon has submitted and to file surrebuttal testimony, if warranted by Verizon's discovery responses.

Argument.

I. VERIZON'S SUBMISSION OF THE NEW WIRE CENTER DATA IS PROCEDURALLY IMPROPER AND SHOULD BE STRUCK.

The rebuttal testimony of Mr. Mudge and Mr. Doane presents an entirely new case in support of Verizon's claim for deregulation. The "Massachusetts Competitive Profile," a more than 1,000 page document attached to Mr. Mudge's testimony and heavily cited in Mr. Doane's testimony, contains data by wire center purporting to demonstrate that sufficient competition exists in Massachusetts to justify deregulation. Verizon's filing of this new evidence, five months after the filing of its direct testimony in support of its proposed Alternative Regulation Plan, is a clear concession that Verizon had not presented the Department with adequate information to warrant deregulation.

At this late stage in the proceeding, Verizon purportedly offers this new data in response to Dr. Mayo's testimony that the evidence it presented in its direct case was not adequate to demonstrate sufficient competition. Dr. Mayo pointed out that it is standard practice to demonstrate, *for each market for which deregulation is requested*, that there is sufficient competition to discipline Verizon prices and that Verizon wholly failed to do that. *See, e.g.*, Testimony of John May, pp. 21-22.

In its rebuttal testimony, Verizon might have argued that Dr. Mayo's criticism

was not valid, and that summary statistics presented by Verizon in its initial case were sufficient, just as Verizon had argued at the May 4, 2001, Procedural Conference.¹

Instead, however, Verizon has attempted to manipulate the schedule and process by late filing new data and analyses to fix the short-comings and infirmities of its case-in-chief, highlighted in the testimony of Dr. Mayo.

In his testimony, Dr. Mayo argued that a market-by-market analysis is both necessary and appropriate to assess whether the level of competition is sufficient to impose service quality and pricing discipline on Verizon in the absence of regulation. Although both Mr. Mudge and Mr. Doane argue that such a market-by-market analysis is not necessary, Verizon concedes that it had not previously provided the Department with adequate justification for its proposed Alternative Regulation Plan by now relying on the newly filed data. This new data includes:

1. a summary of Business and Residence data for Retail, Resale, UNE-P, and E911 at the central office level;
2. a summary of the Verizon data for each central office;
3. a listing of every active competitor operating in the central office and a matrix that displays the categories of services provided by those competitors; and
4. a summary of services provided by each active competitor operating in Massachusetts.

Introduction to the Massachusetts Competitive Profile, Attachment 1 to the Rebuttal

Testimony of Robert Mudge, September 21, 2001.

The purpose of rebuttal testimony is to provide a party with an opportunity to

¹ At the May 4, 2001, Public Hearing and Procedural Conference, in response to comments by AT&T counsel that Verizon's April 12, 2001 filing may not constitute all of Verizon's prima facie case, Verizon counsel stated: "Just for the record, we believe it is complete[.]" See, Transcript, p. 17, lines 5-6.

demonstrate that the analyses, opinions or positions set out in the other parties' testimony are incorrect. It is not an opportunity to cure fatal defects in a direct case, as Verizon has attempted here. Dr. Mayo's testimony did not, of course, address this new data and analyses, since it was not part of Verizon's direct case.. Verizon's late filing of evidence, that it should have presented at the outset, is procedurally improper and therefore should be stricken.

This is not the first time that Verizon has attempted to avoid regulatory scrutiny by filing a "bare-bones" direct case, which it has then sought to supplement in "rebuttal" after the other parties have responded to a plainly inadequate case. Recently, after it was pointed out that Verizon frequently uses rebuttal testimony as an opportunity to supplement its direct case, Verizon was advised to refrain from using rebuttal testimony for such purposes. *See* Hearing Officer Ruling On Verizon Massachusetts' Motion To Amend Procedural Schedule, D.T.E. 98-57 - Phase I (November 3, 2000). In amending the procedural schedule to allow surrebuttal, Verizon was warned that "surrebuttal testimony is not an opportunity to present facts for the first time in support of a position and caution[ed] VZ-MA that inappropriate information included in surrebuttal may be stricken." *Id.* at 4. Pre-filed rebuttal and surrebuttal testimony is meant to "serve[] a useful purpose in focusing issues for the evidentiary hearings." *Id.* Verizon's September 21 rebuttal testimony certainly does not focus issues for the upcoming hearings; rather it introduces an entirely new case for the Department to review.

AT&T therefore moves to strike (1) the Massachusetts Competitive Profile attached to the Rebuttal Testimony of Robert Mudge; (2) page 1, lines 10-15; page 2, line 6, through page 4, line 8; and Attachment 1 of the rebuttal testimony of Robert Mudge;

and (3) and page 10, line 10, through page 18, line 19; and page 20, lines 10-19 of the rebuttal testimony of Michael J. Doane.

II. ALTERNATIVELY, THE PROCEDURAL SCHEDULE SHOULD BE AMENDED TO ALLOW FOR APPROPRIATE DISCOVERY AND THE FILING OF SURREBUTTAL TESTIMONY IF WARRANTED.

In filing statistics by wire center, Verizon – despite its protestations to the contrary – has essentially conceded the validity of Dr. Mayo’s criticism that a more detailed analysis, based on specific and accurate data should have been done. By its own admission, Verizon’s new direct case, even if found to be accurate, falls far short of the type of market specific analysis recommended by Dr. Mayo. Only after AT&T has had an adequate opportunity to analyze the newly submitted wire-center data and the responses to its forthcoming discovery will it be in a position to determine whether surrebuttal testimony on the “Massachusetts Competitive Profile” would be useful to the Department.

AT&T requests that, should its motion to strike Verizon’s procedurally improper testimony and analyses be denied, a new procedural schedule be established that affords AT&T and the other parties the opportunity to analyze and to rebut *all* the evidence that Verizon uses in support of its direct case. Finally, to avoid the confusion and inefficiencies brought by attempting to investigate a continually “moving target,” Verizon should be required to certify that its direct case in Phase I is now complete and will not be further expanded. Accordingly, AT&T proposes the following schedule:

October 9	Verizon certifies that its direct case is complete and will not be further supplemented.
October 15	Open discovery period on Verizon’s new evidence closes

October 25	AT&T Surrebuttal testimony ²
November 1	Discovery Period on AT&T Surrebuttal closes
November 12-16 ³	Evidentiary hearings ⁴
November 23	Record Requests due
December 7	Initial briefs due
December 21	Reply briefs due

² Rebuttal testimony on the wire center data may or may not be warranted. Such a determination can be made only after an opportunity to analyze the data and to conduct discovery on it. AT&T, nevertheless, proposes a schedule that includes a specific surrebuttal date because AT&T is requesting, in a separate motion also filed today, leave to file surrebuttal testimony in response to certain mischaracterizations that Dr. Taylor has made regarding Dr. Mayo's testimony.

³ AT&T recognizes that this is the same week that is scheduled for a NARUC conference in Philadelphia and that a schedule adjustment may be required to the extent that this schedule creates conflicts for Commissioner or Department staff.

⁴ The Department's current schedule calls for two weeks of hearings, October 22 through November 2, 2001. AT&T believes that one week will be sufficient. If, however, additional hearing time is required, the scheduled can be expanded accordingly.

Conclusion.

For the reasons stated, the “Massachusetts Competitive Profile,” and the specific page and line numbers listed above in the “rebuttal” testimony of Mr. Mudge and Mr. Doane should be stricken. In the alternative, AT&T should be given the opportunity to file surrebuttal in response to the new factual data submitted by Verizon’s testimony.

Respectfully submitted,

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